

Remarks

Request is hereby made for reconsideration of the Examiner's refusal to consider the declaration filed on September 11, 2007. Further, it is noted that a Petition to the Director under 37 CFR §1.181 is being submitted in conjunction with this response.

Consideration of the Declaration

Section 716.01(B) of the MPEP states that

Evidence traversing rejections, when timely presented, ***must be considered*** by the examiner whenever present.... ***Where an examiner holds that the evidence is sufficient to overcome a prima facie case, the comments should be consistent with the guidelines for statements of reasons for allowance*** (emphasis added).

Clearly, if the declaration filed on September 11, 2007 is considered timely, then it **must** be considered. As indicated below, it is respectfully submitted that the declaration was timely submitted and, therefore, the Examiner must consider the declaration.

Timeliness of Declaration

Section 716.01(A) discusses timeliness of filing evidence, and provides that

Affidavits and declarations submitted under 37 CFR 1.132 and ***other evidence traversing rejections are considered timely if submitted:***

(3) after final rejection *****>***, but before or on the same date of filing an appeal, ***upon a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented in compliance with 37 CFR 1.116(e).***

As noted in the reply to the final Office Action, the declaration was not previously submitted because, in applicant's opinion, the claims of the present application were distinguishable from the art cited in the first Office Action dated December 22, 2005. In response to the Examiner's rejections as set forth in the first Office Action, applicant presented well-reasoned arguments on the merits distinguishing the claims of the present application from the cited art. Due to these well reasoned arguments based squarely on the merits, the declaration was not believed to be necessary.

In response to applicant's arguments as set forth in the reply to the first Office Action, the Examiner maintained all rejections and made the Action final. While applicant disagrees with the Examiner's rejections, in the interest of advancing prosecution, applicants now are submitting the declaration establishing a date of invention prior to the *Nixon* reference. This declaration is necessary because the Examiner maintained all claim rejections despite applicant's arguments clearly distinguishing the claims from the cited art.

In view of the above, it is respectfully submitted that the declaration was timely submitted and, therefore, must be considered. Further, in view of the fact that the declaration removes *Nixon* as prior art, all rejections should be withdrawn as discussed in the previous submission.

Conclusion

In view of the foregoing, request is made for timely issuance of a notice of allowance.

Respectfully submitted,

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